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No. 93-1911

In The

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,

Petitioner,

vs.

DeMONT R.D. CONNER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether Hawaii regulations that require a finding or admission of guilt of "serious misconduct" before disciplinary segregation may be imposed as a punishment create a liberty interest under the Due Process Clause.

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STATEMENT OF THE CASE

A. Introduction.

As this Court underscored in *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), "[t]here is no iron curtain drawn between the Constitution and the prisons of this country" and "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."

In this case the State of Hawaii seeks to eviscerate constitutional due process protections in a wide range of cases in which prisoners seek essential guarantees of

procedural fairness when state laws provide liberty interests as this Court has defined them in cases following *Wolff*. This radical request to abandon long-established due process jurisprudence is unwarranted under any circumstances. It is especially unwarranted in the context of the issues presented in this case.

B. Background of the Litigation.

1. The August 13, 1987, Incident.

Respondent, DeMont Conner, was incarcerated in Halawa Correctional Facility ("HCF") starting in September 1985. By the end of 1986 Respondent had made excellent progress at HCF; the Administrator of the facility noted "a remarkable change in his attitude and behavior." [J.A. 101]. He consistently received favorable evaluations at his work assignment. [J.A. 102-124].

Respondent was assigned to the general population at the time of the August 13, 1987, incident which is the subject of this case. [CR 83, Exhibits "C" and "K"]. He had the opportunity to work and participate in educational and other programs at the facility. [J.A. 101]. Between his September 3, 1985 arrival at HCF and the August 13, 1987, incident, Respondent was found guilty of only one other incident of misconduct on January 1, 1987. [J.A. 369; CR 83, Exhibit "J"]. He received a 30 day sentence of disciplinary segregation for fighting with another inmate. This sentence was completed by January 30, 1987. After the expiration of this sentence Respondent was assigned to Phase I status, a form of administrative

segregation in operation at the time,[1] but this status was reviewed after only 8 days and he was placed back in the general population. [J.A. 237]. It appears that the August 1987 incident at issue in this case led to a spiral of disciplinary issues between Respondent and prison authorities. [J.A. 237-242].

The August 13, 1987, incident itself began when Respondent left his cell to attend a religious session. [J.A. 93]. Adult Corrections Officer ("ACO") Furtado ordered Respondent to go through a strip search procedure in a way Respondent believed was abusive and degrading. [Pet. App. A63]. Sergeant Summers was present during the incident and cancelled Respondent's religious visit and ordered him to be returned to his cell.

Shortly after the August 13, 1987 incident ACO Furtado filed a report of Respondent's alleged misconduct. [Pet. App. A61]. Another officer, ACO Johnson conducted a brief investigation of the incident and filed a report that was submitted to the prison Adjustment Committee. [Pet App. A61-63]. Respondent was notified of the charges against him and given the opportunity to appear at an August 28, 1987, hearing before an Adjustment Committee chaired by Petitioner. Respondent acknowledged that he complained to Furtado about the harassment he experienced during the incident but Respondent denied at all

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[1] Petitioner notes that Phase I status is no longer in operation at HCF. [Pet. Br. 6 n. 3]. Respondent agrees with Petitioner's contention that this case is not moot because of this change in the rules relating to administrative segregation. In Respondent's view, this case concerns only issues of the punishment of disciplinary segregation for misconduct.

times that he had engaged in conduct that would justify a finding of "serious misconduct." [Pet. App. A63].[2]

2. The August 28, 1987, Hearing.

Under Title 17 of the regulations governing the corrections division of the Hawaii Department of Social Services and Housing, inmates are intended to have all of the "rights" set forth in subtitle 2 of these regulations governing the "adjustment process." These regulations provide for "punishment" only for "specific rule violations."

Sections 17-201-6 to 17-201-11 set forth prohibited acts amounting to "greatest misconduct" (§ 17-201-6), "high misconduct" (§ 17-201-7), "moderate misconduct" (§ 17-201-8), "low moderate misconduct" (§ 17-201-9), "minor misconduct" (§ 17-201-10), and "adjustments" (§ 17-201-11). [Pet.Br. 7-16].

Respondent was charged with using "physical interference or obstacle resulting in the obstruction, hinderance, or impairment of the performance of a correctional function of a public servant," a high misconduct offense. [Pet. App. A65]. He was also charged with using "abusive or obscene language to a staff member" and engaging in "[h]arassment of employees," both "low

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[2] Respondent also contended that Sergeant Summers, the officer on the scene who cancelled his religious visit, was harassing him because of the legal assistance Respondent was providing to other inmates. [J.A. 93]. It is not clear whether prison officials ever considered this allegation of retaliation.

moderate" misconduct charges. [Pet. App. A66]. Respondent received notice of these charges on August 25, 1987. [J.A. 45].[3]

The hearing took place on August 28, 1987. [J.A. 46]. Respondent was present and pled not guilty to all charges. Apparently, no prison staff testified at the hearing. The Adjustment Committee relied on the written reports made by Officers Furtado and Johnson. [Pet. App. A67].[4]

Respondent was not permitted to call staff witnesses he asserted would clear him of the charges. [Pet. App. A66]. The only reason given for the refusal to allow Respondent to call staff witnesses was Petitioner Sandin's written statement that "[w]itnesses were unavailable due to move to the medium facility and being short staffed on the modules." [Pet. App. A67].

Respondent was found guilty of all of the misconduct charges filed against him and was sentenced to 30 days disciplinary segregation on the high misconduct charges, as provided in § 17-201-19. [Pet. App. A66]. He received four hours disciplinary segregation on the low moderate misconduct charge. [Pet. App. A66]. He served the 30 days.

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[3] Officer Furtado's report is dated August 13, 1987. [Pet. App. A61]. Officer Johnson's report on his investigation into the incident is dated August 14, 1987. [Pet. App. A62-63]. There is no explanation in the record concerning the reason for the delay between August 14 and August 25 in notifying Respondent of the charges against him.

[4] There is no transcript, tape or other record of the proceeding.

Respondent filed an administrative appeal under § 17-201-20(a). On May 16, 1988, *after* Respondent filed this federal civil rights action in March 1988, Deputy Administrator Pikini overturned the Adjustment Committee's findings of high misconduct and expunged those charges from his record. [Pet. Br. 15]. Respondent had already served the entire sentence on the high misconduct charge. The findings of "low moderate" misconduct remain on his record.

C. The Hawaii Prison Disciplinary Regime.

Hawaii's prison regulations limit the administrator's discretion to impose disciplinary segregation for "serious misconduct" in the absence of a finding or an admission of guilt. The regulations provide for "punishment" only for "specific rule violations." § 17-201-4. Punishment for a "serious rule violation" may not occur absent a finding or admission of guilt. §§ 17-201-12 through 17-201-20. Section 17-201-18(b) states that a "finding of guilt *shall* be made where:

(1) the inmate or ward admits the violation or pleads guilty; or

(2) the charge is supported by substantial evidence." (Emphasis supplied).

There appears to be no way in which punishment for misconduct may lawfully be imposed under the Hawaii regulations without a prior finding or admission of guilt of a "specific rule violation." Thus, inmates in Hawaii prisons have a legitimate expectation based on the explicit mandatory language in Hawaii's regulations that

they will not be found guilty of misconduct or punished as a result of such a finding unless there is "substantial evidence" of their guilt of specific misconduct.

In addition, Hawaii's regulations provide mandatory procedures for determining whether an inmate has violated a rule. An inmate accused of "serious misconduct,"[5] "shall" be punished only pursuant to the procedures in §§ 17-201-13 to 17-201-20. [Pet. Br. 16-24]. The regulations provide for notice and a hearing before an unbiased adjustment committee normally composed of three members. [Pet. Br. 16-18]. The inmate "shall" receive prior notice of the hearing. § 17-201-16(a). The inmate "shall" be served with written notice of the time and place of the hearing and the specific charges, including a brief notation of the facts not less than twenty-four hours before the hearing. § 17-201-16(b). The inmate or counsel substitute "shall" have the opportunity to review all relevant non-confidential reports of misconduct during the period between the notice and the hearing. § 17-201-16(c). The misconduct report "shall" contain specific information about the charge, the facts and witnesses. § 17-201-16(d).

Unless institutional safety or the good government of the facility would be jeopardized, an inmate has a "right to appear" at the hearing. § 17-201-17(a). An inmate has a "right" to remain silent. § 17-201-17(c). Subject to specific limitations an inmate has the "right" to confront and

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[5] "Serious misconduct" is defined as a "serious rule violation . . . which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours." § 17-201-12.

cross-examine witnesses against him. § 17-201-17(e). An inmate has a "right" to respond to the evidence introduced against him, § 17-201-17(f), and "shall" be permitted to employ substitute counsel. § 17-201-17(g).

Under § 17-201-18(a) an inmate has a "right to be apprised of the findings of the Adjustment Committee." The Adjustment Committee may "render a decision based upon evidence presented at the hearing to which the individual has an opportunity to respond or any cumulative evidence which may subsequently come to light . . . " § 17-201-18(b). However, "disciplinary action shall be based upon more than mere silence." *Id.*

Under § 17-201-19, the Adjustment Committee may render "sanctions commensurate with the gravity of the rule and the severity of the violation." The specific punishments are set forth in this section and in the provisions defining each level of offense in §§ 17-201-6 to 17-201-11.

Section 17-201-20(b) permits the Administrator to initiate a review of the Adjustment Committee's decisions and to modify the Committee's findings or decisions. However, nothing in this section authorizes the Administrator to ignore the Committee's findings or decisions, as Petitioner claims, or to impose punishment in the absence of a finding of guilt or admission of misconduct.

D. This Litigation.

1. Proceedings in District Court.

Respondent filed his original complaint on March 14, 1988. [J.A. 20]. In its Order Granting In Forma Pauperis Application, the District Court recognized that due process was required for the imposition of sanctions for major misconduct based on *Wolff v. McDonnell*, 418 U.S. 539 (1976). [J.A. 25-26]. Petitioner Sandin was named as a defendant in the initial complaint. On May 3, 1988, Respondent moved to amend his complaint to add additional defendants and to add a request for injunctive relief, in addition to the declaratory relief and damages he sought in his initial complaint. [J.A. 27-29].

Between March 1988 and September 1991 the parties litigated a variety of claims in the district court. In September 1989 Respondent filed a second amended complaint raising additional claims,[6] including claims that he was being subjected to a campaign of harassment and retaliation in response to his activities as a jailhouse lawyer. [J.A. 169-194]. In December 1988, Respondent won a preliminary injunction guaranteeing his access to the law library but failed to obtain interim injunctive relief on other claims. [J.A. 66-71].

On May 21, 1991, the Magistrate issued his Report and Recommendations Granting Defendants' Motion For Summary Judgment. [J.A. 325-352]. The district court approved the Magistrate's Report and entered summary

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[6] Respondent continued to assert his due process claims arising out of the August 13, 1987, incident in his amended complaint. [J.A. 251].

judgment against Respondent on all of his claims on September 30, 1991. [Pet. App. A21-A38].[7]

2. Proceedings in the Court of Appeals.

The Court of Appeals affirmed the District Court's Order in all respects except for two issues. The court overturned the District Court's summary judgment on Respondent's First Amendment claim that his religious freedom was impaired by restricting prayers in Arabic. This ruling was not the subject of the Petition and the prison authorities have repealed the rule under which Respondent was disciplined. [Pet. Cert. 9].

The Ninth Circuit also reversed the District Court's summary judgment on Respondent's claim that he was denied due process at the August 28, 1987, hearing. The Court of Appeals found that the record disclosed a genuine issue of material fact as to whether Respondent was denied due process because Petitioner Sandin did not explain why Respondent was not permitted to call staff witnesses who he contended would support his defense to the charge of high misconduct. [Pet. Cert. A3-A9]. The court determined that the issue of whether Petitioner Sandin was entitled to qualified immunity in these circumstances could not be decided without a fuller development of the record.[8] [Pet. Cert. A9].

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[7] Respondent represented himself in both the District Court and Court of Appeals. Respondent is represented by counsel for the first time before this Court.

[8] Because this Court's October 7, 1994, Order limits this proceeding to the first Question Presented by Petitioner, Respondent will not address the qualified immunity issue or the issue of what process was due Respondent if a "liberty interest" is found.

The Ninth Circuit, applying this Court's precedents, found that the Hawaii regulations granted Respondent a "liberty interest" in remaining free from disciplinary segregation unless there was substantial evidence that Respondent was guilty of an act of misconduct justifying disciplinary segregation under the regulations. Based upon this finding, the Court of Appeals remanded the case for further proceedings in the District Court.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's judgment is hardly remarkable. It is based on the core principle firmly established in *Wolff, supra,* 418 U.S. at 571 n.19, that a prisoner may not be punished for misconduct by disciplinary segregation in the absence of procedures satisfying the Due Process Clause. This Court has held that prisoners have a liberty interest protectible under the Due Process Clause whenever explicitly mandatory language in connection with specific "substantive predicates" in state prison regulations limit official discretion. *Hewitt v. Helms,* 459 U.S. 460, 472 (1983).

a. Hawaii's prison regulations governing the imposition of discipline give rise to a "liberty interest" because prisoners may only be punished, by segregation or otherwise, if they are found guilty of or admit to specific misconduct as defined by Hawaii law. The

Hawaii discipline regulations are a paradigm of "substantive predicates" limiting official discretion. Although under Hawaii law the warden may modify Adjustment Committee decisions or findings, punishment may *only* be imposed after a substantive finding or an admission of misconduct. Thus, Hawaii prisoners have a legitimate expectation that they will not suffer disciplinary punishment unless they are found guilty of specific misconduct defined in Hawaii law. The Due Process Clause requires that these legitimate expectations be safeguarded by fair procedures.

b. Petitioner's contention that *Kentucky Dep't. of Corrections v. Thompson*, 490 U.S. 454 (1989), adds an additional requirement that a prisoner *always* be punished under Hawaii law before a liberty interest exists misreads that decision. The denial of the prisoner's claims in *Thompson* occurred because the visiting regulations in that case placed no substantive limitations on the discretion of prison officials. Furthermore, the limitations in Hawaii law are not merely procedural. The requirement of "substantial evidence" of guilt of misconduct is inextricably tied to a substantive finding of specific misconduct.

c. Petitioner's argument that because Hawaii prisoners may be placed in administrative segregation under conditions similar to the conditions of disciplinary segregation undermines Respondent's expectation of freedom from disciplinary segregation without a finding of misconduct is inconsistent with this Court's cases. Under this Court's cases states may create liberty interests in the context of disciplinary segregation, while placing no such limitations on the use of administrative

segregation. Even if the conditions imposed upon an inmate under discretionary administrative classification decisions are found to be similar to those resulting from disciplinary segregation, a prisoner's interest in avoiding disciplinary segregation is still one of "real substance" requiring Due Process. *Wolff, supra*, 418 U.S. at 557. Not only does disciplinary segregation entail adverse living conditions and loss of privileges, the punishment has enormous potential collateral consequences, including possible adverse consequences for parole.

d. The holding in *Wolff* is not limited to disciplinary procedures that inevitably result in the loss of good time credit or other lengthening of confinement. In *Wolff* a liberty interest was found even though the Nebraska regulations in that case provided for sanctions as minor as a reprimand for misconduct. In *Hewitt*, this Court unanimously found a liberty interest to exist even though the Pennsylvania administrative segregation regulations did not have any effect on the duration or nature of confinement as such, nor did administrative segregation have any impact on parole decisions.

e. Even if the Court accepted Petitioner's suggestion that a "bright line" should exist that allows prison administrators complete discretion to engage in arbitrary punishment so long as the duration of a prisoner's sentence is not directly affected, this case should still be governed by *Wolff* and its progeny. Under Hawaii law parole may be denied to an inmate when the Hawaii State Paroling Authority finds that the inmate's misconduct record shows that he has been a management or security problem in prison. Also, even after a parole has been granted, it may be rescinded prior to release if the

Authority receives new information regarding misconduct. Thus, in Hawaii, the inmate's misconduct record plays a role in the Hawaii regulatory scheme substantially identical to the system before this Court in *Wolff*, which permitted but did not require the deprivation of "good time" upon a finding of misconduct.

f. The Ninth Circuit's recognition of a liberty interest in avoiding disciplinary segregation in the absence of "substantial evidence" of specific misconduct flows naturally from this Court's decisions in *Wolff* and *Hewitt* and represents no radical new federal intrusion into day-to-day prison administration. Principles of federalism are not undermined by recognition of liberty interests found in Hawaii's prison regulations.

g. The Court's decisions in *Wolff* and *Hewitt* created a body of precedent and settled expectations throughout the country that should not be lightly abandoned. *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992). None of the justifications for overruling this Court's precedents exist in this case.

2. Apart from the "substantive predicates" of Hawaii law, the Due Process Clause protects Respondent and prisoners similarly situated from arbitrary punishment for alleged misconduct. A central tenet of due process is that persons "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

a. The imposition of substantial punishment upon prisoners is not "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). The

state may legitimately take action for administrative or regulatory reasons without triggering the Due Process Clause, but may be required to afford fair procedures when similar measures are taken because of punishment for misconduct.

b. State prison disciplinary systems have uniformly recognized that substantial punishment must be accompanied by fair procedures. One reason for this is that punishment for misconduct inescapably has consequences beyond the time a prisoner spends in solitary confinement. This Court has recognized the stigma attached to disciplinary segregation in its earlier cases regarding segregation decisions by prison officials. *Hewitt, supra*, 459 U.S. at 473.

c. The safeguards provided by *Wolff* guarantee much more than abstract notions of fairness. Those safeguards play a major role in maintaining peace and security for both inmates and staff. Furthermore, society has a great stake in rehabilitation, promoting that policy of "restoring [the offender] to normal and useful life within the law." *Morrisey v. Brewer*, 408 U.S. 471, 484 (1971).

ARGUMENT

I. HAWAII PRISON REGULATIONS GOVERNING DISCIPLINE ARE WRITTEN IN MANDATORY LANGUAGE LIMITING THE DISCRETION OF PRISON OFFICIALS AND THUS CREATE A "LIBERTY INTEREST" IN REMAINING FREE FROM DISCIPLINARY SEGREGATION ABSENT A FINDING OR ADMISSION OF MISCONDUCT.

A. Hawaii's Regulations Create a Right to be Free from Disciplinary Segregation or Other Punishment in the Absence of a Finding or Admission of "Serious Misconduct."

1. The Hawaii Regulations Contain "Substantive Predicates" Limiting Official Discretion Before Punishment for Misconduct May Be Imposed.

This Court long has held that liberty interests under the Due Process Clause are created by the Constitution and by statutes. The Court has explained that "a person's liberty is equally protected even when the liberty is a statutory creation of the state," *Wolff, supra,* 418 U.S. at 558, since statutory entitlements include "many of the core values of unqualified liberty." *Morrisey, supra,* 408 U.S. at 482. In many cases and in many contexts, the Court has relied on state law as the basis for finding liberty interests. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975) (state law creates a liberty interest in students not being suspended from school without due process).

This Court's decision in *Wolff, supra,* 418 U.S. 539, found that state prison regulations governing the imposition of discipline created a "liberty interest" protected by the guarantees of procedural fairness in the Due Process

Clause. This Court also acknowledged in *Wolff* that prisoners had a "liberty interest" in avoiding solitary confinement. *Id.,* at 571, n.19.

In *Wright v. Enomoto,* 434 U.S. 1052 (1978), this Court summarily affirmed a decision requiring due process before inmates could be placed in "maximum security" units at several California prisons. *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Cal. 1976).[9] Similarly, in *Hughes v. Rowe,* 449 U.S. 5, 11 (1980), this Court observed that "[s]egregation of a prisoner without a prior hearing may violate due process."

In *Hewitt, supra,* 459 U.S. 460, this Court expressly held that prisoners have a liberty interest in remaining free from administrative segregation if "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a liberty interest." 459 U.S. at 472.

States may create liberty interests in a variety of ways. *Id.* The dispositive point here is whether the state

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[9] Petitioner seeks to distinguish *Wright v. Enomoto* because of the particular conditions in the "maximum security" units at issue in that case, or the "strong inference" of racial discrimination, or the "apparent total irrationality" of the placement system in the case. [Pet. Br. 30-31 n.17]. However, the *Wright* court did not base its holding on an independent constitutional violation or on the issue of whether placement in "maximum security" extended an inmate's length of sentence. To the extent *Wright* was based on the conditions in California's maximum security units, the conditions at HCF should be considered by the district court on remand. The record before this Court about these conditions is incomplete.

has placed substantive limits on the discretion of prison authorities to impose disciplinary segregation as a punishment for misconduct.[10] As this Court recognized in *Thompson*, the most common manner in which a state creates a liberty interest is by establishing "substantive predicates" that govern and restrict official decision-making and "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Thompson, supra*, 490 U.S. at 462.

Therefore, under established due process jurisprudence the courts below were required to "examine closely the language of the relevant statutes and regulations" to determine if Hawaii had placed "substantive limitations on official discretion" in its prison regulations to create a liberty interest in remaining free from disciplinary segregation absent a finding of substantial evidence of serious misconduct. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989).

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[10] This Court has found "liberty interests" in state laws governing various aspects of prison administration. For example, in *Greenholtz v. Inmates of Nebraska Penal Cor. Complex*, 442 U.S. 1, 12 (1979), this Court ruled that although the mere existence of a parole system fails to establish a liberty interest for those seeking parole, the particular statute at issue contained mandatory language and thus entitled the inmate to protection. *See also Board of Pardons v. Allen*, 482 U.S. 369 (1987) (Montana parole law required that parole be granted if inmate can be released without detriment to community and therefore creates a liberty interest); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (prisoners have a liberty interest in avoiding the unwanted administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (prisoners have a liberty interest in not being transferred from a prison to a mental institution).

The regulations at issue in this case raise no novel issue under this Court's cases. Indeed, prison discipline regulations will rarely, if ever, give prison officials the unlimited authority to punish a prisoner without a finding of misconduct by the prisoner.[11] Such required findings are a paradigm of "substnative predicates" with a mandatory relationship to the outcome of decision-making. The Hawaii rules constitute "a definite, unqualified, nondiscretionary standard for determining when [the state's] prison officials may as a disciplinary measure take away a prisoner's right to the relatively greater liberty of ordinary confinement, compared to the approximation to solitary confinement that is segregation. . . . " *Gilbert v. Frazier*, 931 F.2d 1581, 1582 (7th Cir. 1991); accord, *Green v. Ferrell*, 801 F.2d 765, 768-69 (5th Cir. 1986); *Sher v. Coughlin*, 739 F.2d 77, 81 (2d Cir. 1984).

As Judge Fong found in *Mujahid v. Apao*, 795 F.Supp. 1020, 1024 (D.Haw. 1992), "[t]here is no question that Hawaii's administrative regulations governing the conduct of a disciplinary hearing are mandatory." More important, Judge Fong found that "[w]ithout question, the Adjustment Committee could not have imposed the sanction or punishment of disciplinary segregation absent a factual finding of misconduct." *Id.* at 1025. "An Adjustment Committee does not have the discretion to impose sanctions wantonly; instead its actions must be

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[11] As the Second Circuit observed in *Sher v. Coughlin*, 739 F.2d 77, 80 (2d Cir. 1984), "[t]he state statutes and regulations authorizing restrictive confinement as a punishment upon a finding of a disciplinary infraction will invariably provide sufficient limitation on the discretion of prison officials to create a liberty interest."

predicated on substantive charges." *Id.* "Punishment is predicated upon guilt." *Id.*

The particulars of Hawaii's disciplinary scheme illustrate its mandatory character. The regulations list specific categories of misconduct from the most to least serious and set forth maximum penalties for each category.[12] § 17-201-6 to § 17-201-11. The "adjustment process" established therein is concerned with tailoring "punishment" to "specific rule violations." § 17-201-4.

"Serious misconduct," as defined in § 17-201-12, "shall" be punished through an Adjustment Committee. The regulations mandate a series of steps before punishment can be imposed. After these steps are followed and there is a hearing before the Adjustment Committee, the

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[12] Petitioner contends that it is significant that punishment is optional even for proven misconduct. Section 17-201-12 states that serious misconduct "shall" be punished and so it is not clear that Petitioner's premise is correct. However, even if there is an option not to punish, as discussed in § IA2, *infra*, whether administrators were *required* to impose punishment upon a finding of guilt is not the issue. The important fact is that punishment may not be imposed *in the absence* of a finding or admission of guilt.

The regulations at issue in *Wolff*, like Hawaii's regulations, provided for a variety of sanctions and authorized, but did not *mandate*, a loss of good time. *Wolff, supra*, 418 U.S. at 552. The Nebraska regulations stated that "[d]isciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." *Id.* Thus, this Court found a liberty interest in this scheme even though there was a very wide range of punishment.

Committee "shall" make a finding of guilt where either (1) the inmate or ward admits the violation or pleads guilty; or (2) the charge is supported by substantial evidence. § 17-201-18(b).

This disciplinary system gives every inmate in the Hawaii State Prison system a legitimate expectation that they will not suffer punishment for "serius misconduct" in the absence of an admission of guilt or a finding of guilt based on "substantial evidence."[13] There could be no clearer substantive limitation on the discretion of prison officials than this.

2. Prison Administrators May Impose Discipline Only After a Finding or Admission of Misconduct.

Petitioner contends that Hawaii's elaborate set of procedures and substantive limits on the imposition of punishment for misconduct are subject to a discretionary override by the warden or "facility administrator" in § 17-201-20(b) that is governed by no limitations on discretion at all. [Pet. Br. 11-12]. § 17-201-20(b) does give the warden the authority to initiate review of any Adjustment Committee decision and to "modify any committee

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[13] Petitioner argues that the "substantial evidence" requirement is a mere procedural burden of proof and thus cannot be found by itself to create a "liberty interest." [Pet. Br. 43-45]. However, even if this characterization of the "substantive evidence" standard is accepted, there is no question but that the "substantive predicate" of a finding of misconduct must occur before punishment can be imposed, regardless of the evidentiary burden applied. *See* § IA4, *infra*.

findings or decisions." Petitioner's suggestion, though, that the warden may impose disciplinary segregation or other punishments without regard to the substantive and procedural limitations in sub-chapter 2 is a bizarre reading of § 17-201-20(b). Petitioner's contention would make the adjustment process an elaborate sham.

The entire structure of Subchapter 2 of the disciplinary regulations relating to "The Adjustment Process" is based on § 17-201-4's general mandate that the process "tailors punishment for specific rules violations." The residual authority vested in the warden to review and modify adjustment committee findings and decisions must be understood in the context of the entire regulatory scheme as a further tool to "tailor" punishment and not as an independent, standardless override power enabling the warden to impose punishment without a finding of guilt.

While § 17-201-20(b) gives the warden certain procedural rights (*e.g.*, to order the Adjustment Committee to rehear the matter) and the right to "modify"[14] committee

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[14] Indeed, the use of the word "modify" in the regulation is itself a substantial limit on the warden's discretion and undermines Petitioner's claim that the regulation gives the warden unfettered ability to overturn committee findings. As this Court declared just last Term: "The word 'modify' – like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum,' – has a connotation of increment or limitation. Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion." *MCI Telecommunications v. American Tel. & Tel.*, ___ U.S. ___, 114 S.Ct. 2223, 2229 (1994). In other words, under Hawaii law, the warden only can make minor changes, modifications, in punishment. There is no limitless discretion to ignore what the Adjustment Committee has done or to impose punishment in the absence of substantial evidence of guilt as Petitioner argues.

findings or decisions, there is no basis in the regulations, Hawaii law or common sense or in the leading federal court decision construing the regulations, *Mujahid v. Apao*, 795 F.Supp. at 1024-25, for Petitioner's argument that the warden may impose punishment without an admission of guilt or substantial evidence of guilt of specified misconduct. Nor is there anything in the record of this case indicating that § 17-201-20(b) provides such unfettered discretion to the warden under Hawaii law or that the warden has in fact punished inmates without a finding or admission of misconduct.

3. The Thompson Decision Does Not Condition the Creation of a "Liberty Interest" Upon Regulations that Mandate Punishment.

Petitioner contends that this Court's decision in *Thompson* creates a "two way mandatory outcomes" test for determining when a "liberty interest" is created by prison regulations. That is, she contends that to create a liberty interest, a regulation must specify the outcome both when the substantive predicate is present and when it is absent, eliminating all discretion either to impose a sanction or to refrain from imposing it.

Petitioner misinterprets the result in *Thompson*. The result in *Thompson* was based on the fact that visitors

could be excluded at will under the policies; thus, there were *no* "substantive predicates" in Kentucky's visiting regulations, *i.e.*, regulations did not place any limits on decisions to deny visits. *Thompson, supra,* 490 U.S. at 464-465. Thus, at bottom *Thompson* is a case like *Meachum v. Fano, supra,* 427 U.S. 215, or *Olim v. Wakinekona,* 461 U.S. 238 (1983), where no substantive limitations on discretion existed in state law.

Thompson itself distinguished the visiting regulations at issue in that case from the administrative segregation rules creating a "liberty interest" in *Hewitt.* In *Hewitt,* the regulations stated that administrative segregation "may" – not "shall" – be imposed based on "the need for control" or other substantive predicates. The Supreme Court noted that this really means that "administrative segregation will not occur absent specific substantive predicates," 459 U.S. at 471-72, and found a liberty interest even though the regulation permitted officials to refrain from imposing segregation even when the substantive predicates were present. Thus, this Court did not require the existence of a "two-way mandatory" outcome to be present before a "liberty interest" was protected.

The Court in *Thompson* concluded:

> The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials.

490 U.S. at 464-65. Thus, this Court's central concern in *Thompson,* as in *Hewitt,* was the question whether the individual had an expectation of enforcement against the government, not whether the government had committed itself to enforcement without exception against the individual.[15]

The "liberty interest" created by the administrative segregation regulations at issue in *Hewitt* did not *require* prison administrators to segregate prisoners if the substantive predicates were met, nor did the disciplinary regulations at issue in *Wolff require* the loss of good time if a finding of misconduct was made.[16] The key point in

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[15] *See, Smith v. Shettle,* 946 F.2d 1250, 1253 (7th Cir. 1991) (Posner, J.) (dicta that "prosecutorial discretion" does not negate a liberty interest); *Mendoza v. Blodgett,* 960 F.2d 1425 (9th Cir. 1992), *cert. denied,* 113 S.Ct. 1005 and 113 S.Ct. 1027 (1993) (question whether there was discretion *not* to impose a restriction was beside the point of liberty interest analysis).

[16] The Third Circuit reached a similar conclusion in *Layton v. Beyer,* 953 F.2d 839 (3d Cir. 1992), in finding a liberty interest in regulations governing placement in the Management Control Units of the New Jersey prison system. The defendants in *Layton,* as Petitioner does here, argued that under *Thompson* the existence of discretion not to impose a liberty deprivation if the substantive predicates are found precludes a finding of a liberty interest.

In rejecting this argument, the *Layton* court found that the key to the *Thompson* holding is that the Kentucky regulations permitted exclusion of visitors based on the listed reasons " 'but not limited to' them." 953 F.2d at 848. That is, if a statute or regulation lists "substantive predicates," but does not make them the exclusive basis for the liberty deprivation at issue, it does not limit officials' discretion sufficiently to create a liberty interest.

Wolff and *Hewitt* was that prison administrators were limited in their discretion to impose disciplinary segregation (*Wolff*) or administrative segregation (*Hewitt*) by the requirements imposed by state law. Unless these "substantive predicates" were met officials could not act against the prisoner. In contrast, in *Thompson*, official discretion was unlimited. If Kentucky regulations had provided that visits "shall not be denied unless" there was a finding of specified misconduct, *Wolff* and *Hewitt* would have required recognition of a liberty interest.

4. The Limitations on Officer Discretion at Issue Herein Are Substantive Limitations.

Petitioner argues that Hawaii's regulations offer merely an expectation of receiving process and that is not a liberty interest protected by the Due Process Clause. [Pet. Br. 43-45]. However, Hawaii law provides that disciplinary segregation "shall" occur only when *particular offenses* are proven by "substantial evidence." Thus, the primary limitations in the Hawaii regulations on administrative discretion to punish are substantive. The regulations provide assurance that prisoners have a right to

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The Third Circuit went on to find that *Thompson's* requirement that the statute or regulation must "mandat[e] the outcome to be reached" if the substantive predicates exist means only "that the statutes must force the decisionmaker to use the listed criteria as the only reasons for depriving the prisoner of the liberty interest in question." 953 F.2d at 849. The Third Circuit's reading of *Thompson* is fully consistent with this Court's decisions in *Hewitt* and *Vitek*. Petitioner's argument would require the conclusion that this Court overruled *Hewitt* and *Vitek* in *Thompson* without saying so.

remain free from disciplinary segregation until and unless the State can prove, with substantial evidence, that they have committed specified offenses. *See* § IA1, *supra*. The substantive limitations exist in Hawaii's discipline regulations regardless of the evidentiary standard under which guilt must be demonstrated.

Moreover, Hawaii law precludes disciplinary punishment unless the state meets its burden of proving certain offenses by substantial evidence. Respondent does not claim a liberty interest based solely on the "substantial evidence" test, as Petitioner suggests [Pet. Br. 43-45]. The fact that Hawaii requires "substantial evidence" of specific misconduct before disciplinary segregation, or other punishment, may be imposed creates the liberty interest claimed by Respondent and found by the Ninth Circuit.

B. The Fact That Respondent Might Have Been Confined to the Special Holding Unit For Classification or Other Non-Punitive Reasons Does Not Undermine Respondent's Liberty Interest in Avoiding Disciplinary Segregation As a Punishment for Misconduct.

Petitioner argues that Respondent is not entitled to due process in disciplinary proceedings, despite the mandatory requirements of Hawaii law, because prisoners may be held in HCF's Special Housing Unit in conditions similar to disciplinary segregation for reasons other than punishment. [Pet. Br. 45]. This case does not concern the authority of prison administrators to make classification or housing decisions. Whether the regulations governing

the exercise of discretion in these areas create liberty interests requires a separate analysis.[17]

Wolff and *Hewitt*, taken together, treat these two segregation determinations differently. If Hawaii wishes to allow complete discretion in classification and housing decisions, Hawaii may do so, regardless of the different requirements of disciplinary proceedings.[18]

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[17] Hawaii classification regulations appear to create liberty interests. *Schroeder v. McDonald*, 823 F.Supp, 750, 762-64 (D.Haw. 1992); *aff'd in relevant part*, ___ F.3d ___, 1994 WL 663407 (9th Cir. 1994). Hawaii's administrative segregation placement regulations were initially held to implicate a liberty interest, but this decision was overturned in *Allen v. City and County of Honolulu*, 816 F.Supp. 1501, 1508-09 (D.Haw. 1993), *overruling Hatori v. Haga*, 751 F.Supp. 1401 (D.Haw. 1989).

This Court has previously found that Hawaii prison regulations do not limit the discretion of prison officials to transfer a prisoner to a prison on the mainland. *Olim, supra*, 461 U.S. 238. The result in *Olim* followed a line of cases starting with *Meachum, supra*, 427 U.S. 215, and *Montanye, supra*, 427 U.S. 236, in which such transfer decisions were found not to implicate liberty interests when state statutes or regulations granted unfettered discretion to prison officials over such decisions. This is in contrast to *Vitek, supra*, 445 U.S. 480, where the transfer to a mental institution was found to be subject to due process protections.

[18] This Court has acknowledged the differences between disciplinary and administrative segregation in *Hewitt*, observing that "[u]nlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation under Pennsylvania's prison regulations." 459 U.S. at 473. This Court has frequently emphasized the difference between confinement for a regulatory purpose and confinement as a punishment even when those two confinements are in the same location. *See also, e.g., Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *United States v. Salerno*, 481 U.S. 739, 746 (1987).

The fact that Hawaii may allow prison officials to make classification decisions in their discretion does not vitiate the liberty interest created by the Hawaii regulations that Respondent not be punished by disciplinary segregation absent a finding or admission of misconduct.[19] Such classification decisions would not have the collateral impact on parole decisions that a finding of "serious misconduct" may have. Hawaii law does not provide for any consideration of a prisoner's administrative segregation record in connection with parole decisions.

Another problem with Petitioner's argument is that it would require courts to examine and compare the conditions in administrative segregation and those in disciplinary segregation before deciding if the Due Process Clause applied in any given case. This new approach not only lacks a coherent rationale; it would be unworkable in

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[19] Petitioner places great reliance on the Seventh Circuit's decision in *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991) (en banc) for her argument that the discretion to put an inmate in administrative segregation undermines Respondent's liberty interest in avoiding disciplinary segregation. As the dissenting opinions in *Wallace* point out, the Seventh Circuit's due process analysis is unsupported by this Court's cases or any other Circuit court cases. *Id.*, at 249. More important, the *Wallace* case did not involve the prison disciplinary system. Rather, the inmate alleged that his transfer from a job assignment, a decision admittedly not subject to substantive limitations on administrative discretion, was really motivated by disciplinary concerns rather than the stated reason that he did not get along with his supervisor. In this case, there is no question about whether Petitioner was acting under Hawaii's discipline regulations and thus *Wallace* is inapplicable. Similarly, *Wallace* involved no government action that might have consequences for parole.

practice and would lead to increased litigation and uncertainty.

Petitioner's attempt to trivialize Respondent's suit by the suggestion that a finding of misconduct merely "marred [Respondent's] record" and was thus no more meaningful than an alleged libel must be rejected in light of the effect a finding of misconduct has in terms of punishment, classification and parole under Hawaii law. [Pet. Br. 47]. The potential punishment, which is more germane for due process analysis, is 30 days in segregation and a finding of misconduct that may be considered by Hawaii parole authorities in deciding when Respondent will be released from prison.[20] In this case the record indicates that Respondent's ability to work was interrupted by his punishment for misconduct. Thus, punishment for misconduct may have enormous collateral consequences in addition to a temporary change in housing and privileges. A prisoner's interest in avoiding 30 days in disciplinary segregation, especially with all of the collateral consequences of a finding of misconduct, is clearly an interest with "real substance." *Wolff, supra,* 418 U.S. at 557. *See* § II, *infra.*

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[20] The fact that Respondent's "high misconduct" has been expunged does not moot his claim for damages.

C. A Prisoner Need Not Lose Good Time Credits or Have His Parole Date Affected Before He Possesses A Liberty Interest in Avoiding Arbitrary Punishment in Prison.

Petitioner argues, without support in this Court's cases, that a prisoner must lose good time credits, or otherwise have his sentence affected, before a "liberty interest" deriving from state law should be recognized by this Court. [Pet. Br. 24-37].

However, this Court has not determined "liberty interests" by a subjective evaluation of the importance of the interest involved but rather has insisted that "liberty interests" are created by reference to state law. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Board of Regents v. Roth,* 408 U.S. 564, 570-571 (1972). The existence of a "liberty interest" under this Court's cases depends on whether a person has "a legitimate claim of entitlement to it." *Id.,* at 577.

In *Hewitt,* this Court found that a "liberty interest" existed without a showing that administrative segregation would result in a loss of good time credits, a loss of parole or any other extrinsic adverse consequence. The only consequence of the decision at issue in *Hewitt* was the removal of a prisoner from the general population pending resolution of disciplinary charges. A unanimous Court held that the regulations created a "liberty interest."[21] Thus, only by

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[21] *Wolff v. McDonnell* itself did not limit its holding to disciplinary procedures that inevitably resulted in the loss of good

overruling *Hewitt* can Petitioner's arguments be accepted.[22]

D. Because Parole in Hawaii May Be Denied As Well As Rescinded After It Has Been Granted Based upon an Inmate's Misconduct Record, The Holding and Rationale of *Wolff v. McDonnell* Apply to Hawaii's Disciplinary Regulations.

Even if this Court accepted Petitioner's revisionist understanding of *Wolff* and overturned *Hewitt*, the potential effect of a finding of misconduct on Respondent's parole brings this case squarely within the holding and rationale of *Wolff*. Without adequate due process protections governing disciplinary charges, prisoners would be subject to the denial of parole based on erroneous misconduct findings – a possibility at odds with the basic teaching of *Wolff* and its progeny.

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time credit. If misconduct was found, the Nebraska regulations at issue in *Wolff* provided for a wide range of penalties from a reprimand to the loss of good time credit. *See*, note 12, *supra*. This Court held, in *Haines v. Kerner*, 404 U.S. 519, 520 (1972), that a claim involving disciplinary confinement alone stated a due process claim under 42 U.S.C. § 1983. *See also Cox v. Cook*, 420 U.S. 734 (1975).

[22] This position would also require the overruling of *Vitek v. Jones* and *Washington v. Harper*, in which this Court found that prisoners have liberty interests in avoiding transfer to mental institutions and in being free from involuntary administration of anti-psychotic medications. Petitioner's request for a bright line rule would entail overruling a quarter of a century of this Court's decisions, relied upon by states throughout the country, that state laws do create liberty interests for prisoners.

Hawaii has established a system of parole. Parole may be granted in Hawaii "at any time after a prisoner has served the minimum term of imprisonment fixed according to law." Haw. Rev. Stat. §§ 353-68, 353-69 (1985). [Pet. Br., 10; Pet. Br. App., 36a-37a]. Though Hawaii has no system of good time credits, an inmate's misconduct record is an important criteria in the parole decision. Parole may be denied to an inmate when the Hawaii State Paroling Authority ("Authority") finds, among other things, that the "inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record." Haw. Admin. R. 23-700-33(b). [Pet. Br. App. at 43a-44a]. Furthermore, even if parole is granted, "it may be rescinded prior to the release of the inmate on parole when the Authority receives new information on the inmate that would be the basis to deny the parole." Haw. Admin. R. 23-700-31(c). [Pet. Br. App. 42a].

The inmate's misconduct record plays a role in the Hawaiian regulatory scheme identical to the "good time" credit system used by the State of Nebraska in *Wolff*, *i.e.*, misconduct may cause a deprivation of physical freedom. In *Wolff*, a finding of misconduct could lead to consequences that "may include but not necessarily be limited to the following: . . . withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." *Id.*, at 552. Thus, although the existence of "good time" was created by statute, the decision to take away such credits upon a predicate finding of misconduct was entirely discretionary.

Hawaii has thus created a system of parole where the availability of early release or the revocation of release

already granted is impacted by a finding of misconduct. This is identical to the "if/then" syllogism in *Wolff*. Since prisoners in Hawaii can be denied parole if they are guilty of any misconduct, the "determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Wolff, supra*, 418 U.S. at 558.

Petitioner carefully skirts this issue in her statement of the "Question Presented." Petitioner expresses the question before the Court as being whether an inmate "who is not subject to a loss of good time credit nor to any *necessary* impact on parole . . . " has a "liberty interest" involved. [Pet. Br., i [emphasis added]]. In *Wolff*, the chief executive officer of any penal facility was empowered so that he "may order that a person's reduction of term as provided in [the Nebraska good time credit statute] be forfeited or withheld." 418 U.S. at 545 n.5 (emphasis supplied). A serious misconduct finding did not *necessarily* have an impact on early release. Likewise here, parole may not *necessarily* be impacted, but the parole authority may base its decision to deny parole on a finding of misconduct. This potential consequence, like the *possible* loss of good time credit in *Wolff*, is serious enough to require due process safeguards even under the arguments advanced by Petitioner and her *amici*.

E. The State Is Not Significantly Burdened and Federalism Is Not Offended By Judicial Recognition that Hawaii Law Creates a Liberty Interest that Prisoners Not be Subjected to Disciplinary Segregation Without Due Process.

Petitioner describes the Ninth Circuit's decision as a "far-reaching ruling" that "expands federal control over

state prison management in a manner which this Court has never approved." [Pet. Br. 24]. This hyperbole is unjustified. The Ninth Circuit's ruling was limited and concluded only that Hawaii law created a liberty interest in avoiding disciplinary punishment in the absence of substantial evidence of or an admission of specific misconduct. As demonstrated in § IA, *supra*, this ruling was fully in accord with two decades of decisions from this Court holding that state laws can create liberty interests for prisoners. The decision did not, as Petitioner claims, require "exacting federal review of prison disciplinary records." [Pet. Br. 25]. All the Ninth Circuit did was recognize that the minimum due process requirements of *Wolff* applied to Hawaii's scheme for disciplinary punishment in its prisons.

Although Petitioner repeatedly invokes federalism and the undesirability of federal judicial control of prisons, Petitioner ignores the fact that the "liberty interest" here was created entirely by Hawaii law and may be modified by Hawaii. It is only then that this Court would be faced with the issue of whether the Due Process Clause itself constrains Hawaii officials from imposing punishment for misconduct in the absence of state regulations creating liberty interests.

In reality, it is the approach urged by Petitioner and her *amici* that would work a radical change in the law. If this Court accepts the argument that state laws do *not* create liberty interests, then the judiciary would bear the entire burden of determining the liberty interests protected by the Due Process Clause. In addition to requiring

the reversal of decades of settled law[23] and the expectations that have developed around this Court's decisions, courts would be required to embark on their own examination of what constitutes "liberty" for due process purposes. Surely this approach raises more federalism concerns than this Court's decisions grounding liberty interests in state law.[24]

F. Fundamental Principles of Stare Decisis Stand in the Way of Petitioner's Radical Reworking of This Court's Due Process Jurisprudence.

In urging this Court to overrule a quarter of a century of precedents defining the meaning of liberty under the Due Process Clause, Petitioner and her *amici* ignore the importance of *stare decisis* and the expectations that have developed throughout the country based on this Court's decisions. As this Court has noted, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for

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[23] *See, e.g., Siegert v. Gilley,* ___ U.S. ___, 111 S.Ct. 1789 (1991); *Paul v. Davis,* 424 U.S. 693 (1974); *Perry v. Sinderman,* 408 U.S. 593 (1972).

[24] A leading commentator explained that "[t]he positivist definition of property and liberty also promotes the Court's interest in judicial restraint by making due process dependent on extrajudicial sources. It promotes federalism by directing the federal judiciary to turn to state law to determine whether protectible interests exist. Including liberty interests in this positivist model compels federal judges to defer to state prison administrators and subjects individual freedom to state control." Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court,* 59 N.Y.U. L. Rev. 482, 526 (1984).

precedent is, by definition, indispensable." *Planned Parenthood v. Casey,* ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992).[25]

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[25] So imbedded in our law are the due process guarantees of *Wolff v. McDonnell* that the United States government has relied upon the protections of *Wolff* in assuring the international community that our Constitution protects prisoners from cruel, inhuman and degrading treatment or punishment in its first compliance report to the United Nations Human Rights Committee under the recently ratified International Covenant on Civil and Political Rights. As the report underscored:

> All correctional systems in the U.S. have codes of conduct that govern behavior, and all have systems for imposing sanctions when inmates violate this code. These disciplinary systems are essential to ensuring the security and good order of correctional institutions. Inmates are provided a copy of the code of conduct immediately upon their arrival at a correctional institution, and additional copies are maintained in the inmate law libraries. The prison disciplinary process is administered internally, but there are important constitutional requirements that provide guidance.
>
> Segregation is one of the sanctions that may be imposed upon an inmate who it has been determined, has violated the code of conduct. Before this sanction may be imposed, the inmate is entitled to due process protections emanating from the Fifth and Fourteenth Amendments of the Constitution and recognized by the Supreme Court in *Wolff v. McDonnell,* 418 U.S. 539 (1974).

Initial Report of the United States of America to the U.N. Human Rights Committee Under the International Covenant on Civil and Political Rights, United States Department of State (July 1994), at 68. The United States will defend its initial report before the United Nations Human Rights Committee in March 1995.

Stare decisis, of course, is not absolute. But this Court has recognized only relatively limited circumstances which justify the overruling of precedents. Precedents are overruled if a "rule has proved to be intolerable simply in defying practical workability," or if the law has changed so much as "to have left the old rule no more than a remnant of abandoned doctrine," or if "facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification." *Id.*, at 2808-2809.

None of these justifications for overruling precedent is present here. Every state has adopted statutes and regulations that provide for due process before the imposition of prison discipline; this has not proven unworkable in practice.[26] Neither the law nor facts have changed in a way that would justify the radical departure from precedent urged by Petitioner and her *amici* in asking this Court to abandon state law as a source of liberty interests or to conclude that prisoners, once incarcerated, have no liberty interests.

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[26] Many federal court cases have found that the extent of inmate-inmate violence in particular prisons constitutes cruel and unusual punishment. However, counsel knows of no case attributing such a condition to the strictures of *Wolff* in the conduct of disciplinary hearings. Rather, they are generally attributed to overcrowding or to management deficiencies such as inadequate classification or staff supervision, or to failure to investigate and prosecute misconduct in the first instance. *See, e.g., LaMarca v. Turner*, 995 F.2d 1526, 1537-38 (11th Cir. 1993) *cert. denied*, 114 S.Ct. 1189 (1994); *Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), *aff'd* 902 F.2d 2 (2d Cir. 1990).

For the last quarter of a century, this Court has held that liberty and property interests are generated by laws that create expectations. The function of due process is to protect these expectations and to limit arbitrary government conduct which would deprive people of their liberty and property interests created outside the Constitution. This Court should reject the urging of Petitioner and her *amici* to overrule countless decisions which have followed this approach to the Due Process Clause.

II. THE DUE PROCESS CLAUSE, INDEPENDENT OF LIBERTY INTERESTS EMANATING FROM STATE LAW, REQUIRES THAT FAIR PROCEDURES BE EMPLOYED BEFORE IMPOSING PUNISHMENT LIKE THAT IMPOSED UPON RESPONDENT.

A. The Imposition of Substantial Punishment is a Liberty Deprivation Meriting Due Process Protections.

A central tenet of due process is that persons "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This principle has been applied in a variety of contexts. In *Bell*, it governed the inquiry into the constitutionality of conditions of pre-trial detention. In other cases it has been applied to matters as various as the deprivation of citizenship, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67, 186 (1963); the suspension of Social Security benefits, *Flemming v. Nestor*, 363 U.S. 603 (1960); the corporal punishment of schoolchildren, *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); and imprisonment at hard labor for immigration violations. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

To say that punishment may not be imposed without an adjudication of guilt acknowledges the self-evident fact that one of the greatest constraints of human freedom is the power of government to bring its coercive powers to bear upon citizens. Moreover, an action taken to punish a person for some real or imagined misconduct is more devastating in its impact than that same action taken in the service of the legitimate operation of government.[27]

Convicted prisoners have been adjudicated guilty of crimes. However, a finding of guilt as to one specific crime does not give the state unlimited power exercised by prison officials to impose additional punishments for alleged misconduct in prison. Such an unlimited power to punish cannot rationally be comprehended within the proposition that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum v. Fano, supra,* 427 U.S. at 224. Disciplinary punishment without constitutional check is not "within the normal limits or range of custody which the conviction has authorized the State to impose," (*Id.*, at 225), any more than commitment to a mental hospital or subjection to the unwanted administration of psychotropic drugs. *See Vitek, supra,* 445 U.S. at 488; *Washington, supra,* 494 U.S. at 221-22.

Given the complexities of modern life and government, the state may legitimately take actions for genuine

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[27] As Justice Holmes once observed, "even a dog distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1981).

administrative or regulatory reasons that are similar or even identical to measures that are used as punishment in other contexts. Thus, persons awaiting trial may be incarcerated, *Bell,* 441 U.S. at 537, although incarceration is also the nation's primary form of punishment. Deprivation of citizenship requires due process when done for punitive reasons, but not when done as an exercise of Congress' power to regulate foreign affairs. *Kennedy v. Mendoza-Martinez, supra,* 372 U.S. at 162-67, distinguishing *Perez v. Brownell,* 356 U.S. 44 (1958). In the prison context, persons may be placed in administrative segregation, despite similarity to the conditions of punitive segregation, without running afoul of the Due Process Clause. *Hewitt, supra,* 459 U.S. at 468.

The "punishment" inquiry may present difficult line-drawing problems in some cases, as this Court has long acknowledged.[28] *See Montanye v. Haymes,* 427 U.S. 236

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[28] This Court's cases acknowledge that determining what constitutes punishment is not always straightforward. It has stated as a test:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operations will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

(1976) (declining to distinguish between transfers imposed for administrative purposes and those that might circumstantially be shown to be punitive). However, no such problems present themselves here, since it is not disputed that Hawaii's system of sanctions for violations of disciplinary rules is a punitive system or that the treatment of the Respondent was punitive in nature.[29]

B. The Court's Prior Decisions Acknowledge that Substantial Punishments Require Due Process Protections.

The Court's decisions support the proposition that due process protections must be observed when substantial punishments are meted out to prisoners in the prison disciplinary system. In *Wolff, supra,* 418 U.S. 539, the Court held that a prisoner has a liberty interest under the

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Bell v. Wolfish, supra, 441 U.S. at 537-38, quoting *Kennedy v. Mendoza-Martinez, supra,* 372 U.S. at 168-69.

The practicalities of prison administration may impose a *de minimis* standard of punitive action such that minor punishments for minor misconduct may escape due process scrutiny or call for lesser procedural protections. *See Wolff, supra,* 418 U.S. at 571 n. 19 (dicta suggesting that "lesser penalties such as the loss of privileges" would not require *Wolff* procedures); *McCann v. Coughlin,* 698 F.2d 112, 121 (2d Cir. 1983) (setting threshold for due process inquiry at placement in "Special Housing Unit" or two weeks' confinement in prisoner's own cell). That question is not before the Court in this case.

[29] The lexicon of the Hawaii prison regulations focuses on "punishment" for prohibited acts within the various categories. §§ 17-201-6(b); 17-201-7(b); 17-201-8(b); 17-201-9(b); 17-201-10(b).

due process clause of the Fourteenth Amendment, independent of any liberty interest that may be created by state law, in not being arbitrarily punished with solitary confinement. The Court declared:

> [I]t would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue.

Id., at 571 n. 19.

This Court did not concern itself with the source of this right not to be arbitrarily held in solitary confinement, but recognized that there was no principled distinction between punishment forfeiting good time and punishment imposing solitary confinement. This right was acknowledged to exist even though the Court did not locate its source within state law.

In *Cox v. Cook,* 420 U.S. 734, 736 (1975) (*per curiam*), this Court noted one year later that "[i]n Wolff v. McDonnell, . . . we held that a state prisoner was entitled *under the Due Process Clause of the Fourteenth Amendment* to notice and some kind of hearing in connection with discipline determinations involving serious misconduct." (Emphasis added.) In *Hughes v. Rowe,* 449 U.S. 5 (1980) this Court approved of a lower court's statement that the Fourteenth Amendment affords a prisoner minimum procedural safeguards before disciplinary action may be taken. (*Id.* at 9.) This Court has been steady in holding that, in addition to liberty interests created by state laws, the serious loss of freedom imposed by solitary confinement is *inherently* a deprivation of liberty.

The Court emphasized in *Wolff* that the "touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558. Since *Wolff*, neither this Court nor any lower court has altered the composition of that touchstone by allowing arbitrary government action that results in the serious loss of freedom to a prisoner.

C. The Consequences of Prison Punishment Go Beyond the Sanction Imposed and Have a Pervasive Effect on Liberty.

In recognition that imposing punishment is a qualitatively different act from imposing restrictions based on administrative necessity, every state prison disciplinary system appears to require some finding of misconduct before discipline can be imposed.[30] Most states' classification and transfer systems, and many states' administrative segregation systems, build in sufficient discretion that they do not create liberty interests.[31] By contrast, we know of *no* state that authorizes the imposition of substantial punishment at the discretion of prison officials, without requiring a finding that the prisoner committed a

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[30] This is the characterization made by the United States in international human rights forums. *See* note 25, *supra*.

[31] *See, e.g., Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994) (Colorado administrative segregation); *Newell v. Brown*, 981 F.2d 880, 883-84 (6th Cir. 1992) (Michigan security classification), *cert. denied*, 114 S.Ct. 127 (1993); *O'Bar v. Pinon*, 953 F.2d 74, 84-85 (4th Cir. 1991) (North Carolina "pending evaluation" segregation, temporary release, reclassification, and transfers).

specific act in violation of a specific rule – notwithstanding the tortured construction placed on the Hawaii rules by the present Petitioner.

This recognition by the states is consistent with the reality that punishment for misconduct in a prison setting inescapably has broad consequences beyond the days a prisoner may spend in a segregated unit. A prisoner's disciplinary record can and will affect his eligibility for a less restrictive classification, for more desirable (or for any) employment within the prison, for transfer to a more desirable prison, for admission to educational or other program opportunities,[32] or for work-release, furloughs, and other forms of temporary release. While the deprivation of none of these matters individually rises to the level of constitutionally defined liberty, their pervasive and cumulative impact strongly supports the proposition that the factor common to all of them – the prisoner's disciplinary determinations – should be recognized as implicating liberty.

A fortiori, the impact of prison discipline and punishment on the extent of imprisonment itself compels the

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[32] Inmates at HCF, including Respondent herein, are eligible to and do participate in the Correctional Industries Program. Hawaii Revised Statutes (1985 & Supp. 1992) § 354D-1, *et seq.* Under that program, the Department of Public Safety, "shall recommend a possible reduction in the minimum term to the Hawaii Paroling Authority for any offender satisfactorily participating in the Correctional Industries Program for a minimum of one year. . . . " § 354D-119b. A finding of serious misconduct disables the inmate from satisfactorily participating in the program and thereby obtaining the recommendation of a possible reduction in the minimum term.

recognition that imposing substantial punishment in prison should be recognized as a liberty deprivation. It is plain that a prisoner with an unfavorable disciplinary record has a substantially diminished chance of release on parole.[33] What is more, findings of misconduct can be used not just to deny parole but also to rescind parole that already has been granted. Haw. Admin. R. 23-700-31(c).

The Hawaii *Parole Handbook* expressly declares that the Parole Authority looks at the "number of misconducts." Specifically, the Hawaii *Parole Handbook* states that "[t]he Authority will look at: (1) the seriousness of the misconduct; (2) the number of frequencies of misconduct; (3) whether the misconduct indicates that the offender displays the patterns of behavior which brought him/her to prison; and (4) whether the misconduct record indicates that the offender cannot follow the terms and conditions of parole." *Parole Handbook,* at 7.

The initial finding of serious misconduct in this case and the imposition of disciplinary segregation potentially had a significant effect on Respondent's release date. In *Hewitt,* this Court recognized that the protections offered an inmate depend to a certain extent upon whether or not

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[33] The fact that an expectation of parole may not constitute a liberty interest does not vitiate this point. When parole *is* possible and one of the criteria that paroling authorities use is an inmate's conduct record, parole decisions "involve a wholly retrospective factual questions" (*Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 9-10 (1979)) that demand a structure "to minimize the risk of erroneous decisions." *Id.* at 13; *see also Morrissey, supra,* 408 U.S. at 484.

it will have a significant effect on parole. *Hewitt, supra,* 459 U.S. at 473, ("[t]here is no indication that administrative segregation will have any significant effect in parole opportunities.") The influence of the inmate's disciplinary record on parole opportunities in Hawaii is indisputable.

D. Important Policy Considerations Support the View that Substantial Prison Punishments Cannot be Imposed Without Due Process.

There was a day when prisons could and did operate entirely arbitrarily, with no authority except the personal authority of the prison staff, and no recourse from their actions and decisions. That day is past. The exercise of arbitrary authority to punish, in prison or out of it, is alien to the basic norms of American society.

The safeguards of *Wolff* do more than guarantee a minimal integrity of fact-finding in prison discipline. They play a major role in maintaining the peace in prison, and therefore maintaining the safety of both inmates and staff. Twenty years after *Wolff,* minimal fairness in prison disciplinary proceedings has become part of the settled expectations of prison life.[34]

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[34] One cannot expect that the self-interest of prison officials and staff is sufficient to guarantee fairness in discipline, without reference to constitutional requirements and their enforcement. As this Court has acknowledged in denying absolute immunity to prison hearing officers, there are many pressures militating against fairness in prison. "It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." *Cleavinger v. Saxner,* 474 U.S. 193, 204 (1985).

Moreover, both society and the inmate have a stake in rehabilitation. Concededly, there is no constitutional right to rehabilitation; but it is beyond the nation's ability to keep all, or even most, wrongdoers locked up in perpetuity. For all but the worst offenders, the day will come when they return to the streets of lawful society. This Court recognized long ago that "[s]ociety has a stake in whatever may be the chance of restoring [the offender] to normal and useful life within the law. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey, supra,* 480 U.S. at 484 (dealing with parole revocation).

What is true for parolees is no less true for prisoners. Treating prisoners in a lawless fashion cannot promote their allegiance to the rule of law. The entire rehabilitative ethos, even in maximum security facilities like HCF, as well as the need for security and order in the facility, depend upon an environment that gives prisoners reasonable expectations that they will not be punished arbitrarily. To command obedience, the law itself must be credible and fair. For prisoners, once convicted and sentenced, their primary experience of the law is the prison disciplinary system. To hold that states can place this system wholly outside the bounds of the Due Process Clause, the Constitution's central guarantee of official lawfulness, would author a lesson for which all society ultimately may pay.

CONCLUSION

For all of these reasons the judgment of the Court of Appeals should be affirmed.

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